TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~453.~~ 237 245

JOHN R. SMITH, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF WASHINGTON TERRITORY.

FILED DECEMBER 29, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 453.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of Washington Territory, greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of Washington Territory, before you, between John R. Smith, plaintiff in error, and the United States, defendants in error, a manifest error hath happened, to the great damage of the said John R. Smith, as by his complaint and allegations appears:

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

2 Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 28th day of January, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.]

A. W. MOORE,
Clerk of the Supreme Court of Washington Territory.

3 (Indorsed:) Supreme Court of the United States. Writ of error. John R. Smith, pl'ff in error, vs. The United States, def'ts in error. John J. McGilvra, att'y for pl'ff in error.

4 UNITED STATES OF AMERICA, *ss:*

To the United States of America, greeting:

You are hereby cited to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of Washington Territory, wherein John R. Smith is plaintiff, and the United States are defendants in error, to show cause, if any there be, why the judgment in the said writ mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable B. F. Dennison, chief justice of the supreme court of Washington Territory, this 28th day of January, A. D. 1870.

B. F. DENNISON,
Chief Justice of the Supreme Court of the Territory of Washington.

5 TERRITORY OF WASHINGTON,
County of Thurston, ss:

William Billings, on oath, says that he served the within citation by delivering a true copy thereof to Leander Holmes, the United States

attorney for Washington Territory, at the county of Thurston, W. T., on the 16th day of February, A. D. 1870.

W'M BILLINGS.

Subscribed and sworn to before me this 18th day of February, A. D. 1870.

A. W. MOORE,
Clerk of Supreme Court, W. T.

(Indorsed:) John R. Smith, pl'ff in error, vs. The United States, def'ts in error. Citation.

Served the within citation upon the within-named Leander Holmes, by delivering to him a true copy thereof, duly certified by me to be such, at the county of Thurston, in Washington Territory, on the 16th day of February, A. D. 1870.
Olympia, Feb. 18th, A. D. 1870.

PHILIP RITZ, *U. S. Marshal.*
By WILLIAM BILLINGS, *Deputy.*

Service, $2 00; copy, 50 c.; mil'age, 10.

6 UNITED STATES OF AMERICA,
Washington Territory, ss:

Supreme court of Washington Territory.

The following is a transcript of the records and proceedings in the case of John R. Smith, pl'ff in error, vs. The United States, def't in error, decided in the said supreme court of Washington Territory, at its late December term, upon writ of error to the 3rd judicial dist. of said Territory, made in compliance with a writ of error from the Supreme Court of the United States in the same case.

7 In the United States district court, the third judicial district of Washington Territory, holding terms at Seattle, for the counties of King, Kitsap, & Snohomish, August term, 1868.

Tuesday, Aug. 18th. Second judicial day.

The grand jury on the part of the United States came into court, and, by their foreman, William Pickering, here presented the following bill:

UNITED STATES } Indictment, murder.
vs
JOHN R. SMITH. }

A true bill.

WILLIAM PICKERING,
Foreman.

UNITED STATES OF AMERICA,
Territory of Washington:

In the district court of the United States for the third jud'l dist. W. T., holding term at Seattle, August, 1868.

UNITED STATES }
vs
JOHN R. SMITH. }

At the regular term of the United States district court for the third

judicial district of Washington Territory, holding terms at Seattle,
in said third judicial dist. for the counties of King, Kitsap, and
8 Snohomish, begun and held on the 17th day of August, 1868,
it being the third Monday of said month, and the day appointed by law for holding said court:

The grand jurors of the United States, good and loyal men of the counties aforesaid, then and there duly elected and empanneled, sworn, and charged on the part of the United States, to enquire within and for the body of the said district aforesaid, for all offences against the laws of the United States, on their oaths present:

That one John R. Smith, late of the district aforesaid, on the (28) twenty-eighth day of April, A. D. 1868, upon the high seas, out of the jurisdiction of any particular State of the United States, and on waters within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court, in and on board of a certain bark called the Marinus, owned by a person or persons to the jurors unknown, in and upon Edward James Butler, (mariner,) in the peace of God, and of the United States, then and there being on board the said
bark, called the Marinus, riding at anchor below low-water mark,
9 on the high seas, out of the jurisdiction of any particular State of
the United States, within the admirality and maritime jurisdiction of the United States and within the jurisdiction of this court, piratically, feloneously, wilfully, and of his mal*l*ice aforethought, did make an assault *and* the said John R. Smith, with a certain weapon called a capstan bar, which he, the said John R. Smith, in his hands had and held, on board the said bark Marinus aforesaid, on the 28th day of April, 1868, then and there being on the high seas, within the admiralty and maritime jurisdiction aforesaid, and out of the particular jurisdiction of any particular State of the United States, and within the jurisdiction of this court, then and there piratically, feloniously, wilfully, and of his mal*l*ice aforethought, did strike and beat the said Edward James Butler (mariner) with the capstan bar aforesaid, in and upon the back part of the head of him, the said Edward James Butler, and in and upon the front part of the head of him, the said Edward James Butler, two mortal strokes and wounds, of which said mortal strokes
and wounds, the said Edward James Butler (mariner) then and
10 there, on board the bark Marinus, on the high seas aforesaid, out
of the jurisdiction of any particular State of the United States, and within the jurisdiction of this court, on the said 28th day of April, 1868, did die; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said John R. Smith, in manner and form aforesaid, piratically, feloniously, and of his mal*l*ice aforethought, did kill and murder the said Edward James Butler (mariner) as aforesaid, against the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the said grand jury, upon their oaths, do further present that, after the commission of the aforesaid crime on the high seas, and within the jurisdiction of this court, the aforesaid John R. Smith was first brought into the (3) third jud. dis. of the United States district court for Washington Territory.

LEANDER HOLMES,
United States Attorney.

11 Comes now into open court the def't in his own proper person, and by his attorney, Frank Clark, esq., and was duly arraigned,

and, upon such arraignment, answered that he was indicted by his right name, and took time to consider of his defense.

12 (Indorsed:)
United States vs. John R. Smith. Indictment for murder.
A true bill.
WILLIAM PICKERING, *Foreman.*

Filed in presence of the grand jury in open court this 18th day of August, A. D. 1868.
L. B. ANDREWS, *Clerk.*

Witnesses: Collins Steel, Vincent Cordell, John Rasce, G. W. Minot, W'm Brown, John Morris, John Brisham.
Change of venue to Port Townsend.
Filed August 25th, 1868. J. Leary, clerk.

13 UNITED STATES OF AMERICA,
Territory of Washington, County of King:

U. S. district court for King et al. counties, Aug. term, 1868.

UNITED STATES
vs.
JOHN R. SMITH. } Indictment for murder.

John R. Smith, defendant, being duly sworn, says that he is not ready for trial of this cause at the present term of court:

1st. Because of the absence of material witnesses for the defense, whose presence and attendance at the present term of court it has been impossible for him to procure.

Affiant says he can prove by one Frank Speare, that was a mariner on board the bark Marinus on the voyage from San Francisco to the Sound, in April last past, that the dec'd, Butler, on dif'erent and several occasions during the three or four days immediately preceeding his death, threatened to take the life of deponent with a slung shot, which dec'd exhibited to Mr. Spear, and that Mr. Spear informed the affiant of the said threats of the deceased.

14 Affiant also says that, on the day of the death of the deceased, the deceased used abusive and threatening language to this affiant, and that just at the time, or immediately before the time of the affray that resulted in deceased' death, the deceased used language and gestures that, coupled with the threats theretofore made to said Spear, led this defendant to believe, and would have induced any reasonable man to believe, that to disable the deceased from doing harm to the affiant was the only safe way to prevent great bodily injury to himself.

Affiant further says that he had no intention of killing the deceased, but simply of disabling him, and of preventing him from doing great bodily harm to affiant.

Affiant says that he can prove these said threats of deceased by one Mr. Draper, who was on the wharf at Port Blakely at the time, but who is now absent in California; and that he can also prove by said Draper that prudence and self-defense required instant action, and left no time to consider what means should be used to prevent threatened
15 injury by deceased.

Affiant says that he has learned for the first time to-day of the fact of his ability to prove the aforesaid facts by the aforesaid witnesses; and that, confined as he has been, without means, and having no acquaintance, he has been utterly unable to prepare for his defense, either by fully instructing his counsel as to the facts, or by ascertaining the names or whereabouts of the witnesses who were present and witnessed the affray between the deceased and affiant.

Affiant further says that he knows of no other persons by whom he can prove the aforesaid facts than those above named. He also says that, by reason of his ignorance of the law and his inability to engage counsel to give to his cause such an examination as would enable them to properly understand the same and conduct its trial at the present term of court, he is not, and cannot be, ready for a trial of the same at the present term of said court.

He also says that his object is not delay, but to have justice
16 done in the premises; and that, inasmuch as he does believe that the said jurors of King, Kitsap, and Snohomish are so prejudiced against him as to render it impossible for him to get an impartial trial from a jury therefrom selected and drawn, he asks the court to grant a change of venue in the trial of his cause to Pierce County, and to make provision that he have counsel provided for the proper conduct of his defense.

He also says that, should said postponement of trial and change of venue be granted, that he believes he will be able to produce such testimony upon the trial of his cause.

JOHN R. SMITH.

Subscribed and sworn to before me this 19th day of August, A. D. 1868.

L. B. ANDREWS, *Clerk.*

(Indorsed:) United States vs. John R. Smith. Filed August 19th, 1868. L. B. Andrews, clerk. Change of venue to Port Townsend. Filed Aug. 25th, 1868. J. Leary, clerk.

17 Friday, August 21st. Twelfth jud. day.

UNITED STATES *vs.* JOHN R. SMITH. } Indictment, murder on the high seas.

According to agreement of def't, in person and by attorney, with the attorney of the United States, made in open court, this cause is ordered to the next term of the United States district court, at Port Townsend. And Collins Steel, Vincent Cordell, John Rosa, William Brown, John Morris, and John Brisbain, witnesses duly subpœned to attend at the present term on behalf of the United States in the above-entitled cause, appeared in open court, and each for himself acknowledged himself bound unto the United States in the penal sum of 500 dollars, conditioned for his appearance on the seventh day of September, A. D. 1868, in the United States district court, holding terms at Port Townsend, then and there to give evidence in the above-entitled cause, and not to depart therefrom without leave of the court.

18 In the United States district court holding terms at Port Townsend, in Jefferson County, in and for the 3d judicial district,

Washington Territory, at its regular September term, 1868, the following proceedings were had:

SEPTEMBER 8TH.

UNITED STATES
vs.
JOHN R. SMITH. } Indictment for murder.

U. S. att'y Holmes for plaintiff.

J. J. McGilvry, esq., att'y for defendant, who, in his own proper person, is present in court.

Upon motion, it is ordered that the clerk furnish defendant with a list of the petit jurors, and of the witnesses in this case.

Ordered by the court, that the cause of the United States vs. John R. Smith, take precedence in the trial of the cause of Washington Territory vs. John R. Smith.

SEPTEMBER 9TH.

UNITED STATES
vs.
JOHN R. SMITH. } Indictment for murder.

19 This cause being now called, J. J. McGilvra, esq'r., files his plea to the jurisdiction of the court, in behalf of the defendant, who is present in person.

U. S. att'y Holmes, for plaintiff, files a demurrer to the same.

After argument of counsel, the court sustains the demurrer, and rules the plea insufficient.

To which ruling of the court the defendant, by his attorney, excepts.

Upon motion of U. S. dist. att'y Holmes, the court orders that the prisoner, John R. Smith, be placed in the custody of the U. S. marshall for the Territory of Washington, and that the case be remanded to King County for trial, and directs that the clerk of this court forward to the third judicial district court of Washington Territory, holding terms at Seattle, all the papers in this cause of the United States vs. John R. Smith, together with a certified copy of the journals of this of all the orders and rulings of the court here relating thereto, before the next term of the said district court holding terms at Seattle; and that at said
20 term of said court, holding terms at Seattle, the United States marshall have him, the said John R. Smith, before the said court, to abide by the orders and judgment of the same concerning him, the said John R. Smith, and that he there be placed in his original position in regard to his plea and defense.

To all of which orders and rulings the defendant, John R. Smith, by his attorney, J. J. McGilvry, excepted.

It is further ordered that the witnesses, John Rosa and Collins Steel, remain in the custody of the marshall of Washington Territory, to be produced as witnesses on the part of the United States in the trial of said cause against John R. Smith, unless they give bail, with sureties, in the sum of two hundred and fifty dollars each, for their appearance as witnesses at the time and place of such trial, and that William Brown, John Morris, John M. Brisbain, & Cordell, be held each on his own recognisance to be and appear as witnesses before said court at
21 Seattle, on the trial of said cause, in the sum of five hundred dollars.

UNITED STATES, *Washington Territory, ss:*

I, R. G. Stewart, clerk of the United States district court of Washington Territory, in and for the 3rd judicial district, holding terms at Port Townsend, do hereby certify the foregoing to be a full, correct, and true copy from the journals of said court, of all the proceedings had therein at its regular September term, 1868, in open court, in the action of the United States vs. John R. Smith, indictment for murder. And I do further certify that the accompanying papers embrace the original indictment, and all other papers filed in my office in said cause of the United States vs. John R. Smith.

In witness whereof I have hereunto set my hand and attached the seal of said district court, holding terms at Port Townsend, this 14th day of September, 1868.

[L. S.] R. G. STEWART, *Clerk.*

(Indorsed:) 3rd judicial district. United States vs. John R. Smith. Copy of journal entries.

22 In the dist. court of the U. S., 3rd judicial dist., W. T., holding terms at Port Townsend.

UNITED STATES *vs.* JOHN R. SMITH. } Indictment, murder.

SEP. 7TH, 1868.

And now comes the United States, by Leander Holmes, U. S. attorney, and for reply admits that the crime charged was committed on board the bark Marrinus, while riding at anchor in the bay of Port Blakely, below low-water mark; that said vessel was being loaded with lumber; that this court has jurisdiction of this case, and therefore demurs to the plea of defendant, and asks this case should proceed to trial, on the part of the United States.

LEANDER HOLMES,
U. S. Attorney.

23 FEB'Y 17TH, 1869.

UNITED STATES *vs.* JOHN R. SMITH. } Indictment, murder.

Application filed by defendant's attorneys, McGilvra and Clark, esqs., to remand this cause to Port Townsend.

24 TERRITORY OF WASHINGTON,
County of King, ss:

In the district court of the United States for the 3rd jud'l dist. of said Territory held at Seattle in and for the counties King, Kitsap, and Snohomish.

THE UNITED STATES *vs.* JOHN R. SMITH. } Indictment for murder.

And now comes the said defendant in his own proper person, and by his attornies Garfielde, McGilvra and Clark, and protesting against the

jurisdiction on the ground that a change of venue was regularly taken at the last term of this court upon the application of the said defendant from this court to the U. S. dist. court held at Port Townsend, in Jefferson County, W. T., and he now moves the court to remand this cause to Port Townsend for trial.

GARFIELD, McGILVRA AND CLARK.

25 (Indorsed:) Murder. The United States vs. John R. Smith. Application to remove his case to Port Townsend. Filed Feb. 17th, 1869. L. B. Andrews, clerk. Copy.

26 FEB. 18TH, 1869.

UNITED STATES } Indictment, murder; found at the August term, A. D.
vs. } 1868.
JOHN R. SMITH. }

On motion of James K. Kenedy, esq., who appears on the part of the United States, a nolle prosequi was entered in this case, and a motion filed by def't's counsel to remand cause to Port Townsend.

Overruled.

27 In the United States district court for the third jud. dist. of Washington Territory, holding terms at Seattle for the counties of King, Kitsap, and Snohomish.

Be it known that, at the February term, A. D. 1869, of the said court, Hon. B. F. Dennison, judge, presiding, among other business had and done, was the following, to wit:

The panel of grand jurors being full, the court considering there had been informality in the summoning said jurors, discharged the pannel and ordered a venire to be issued to the marshall, commanding him to summons sixteen good and lawful men, qualified electors and householders from the body of the counties of King, Kitsap, and Snohomish, to serve as grand jurors on the part of the United States at the present term, which venire was duly issued, and the following-named persons appeared as having been duly summoned thereon, to wit: D. R. Baxter, Perry Dunfield, Walter Graham, J. R. Wooden, B. L. Johns, A. A. Denny, Baring Downey, F. Guttenburg, Cha's Robinson, Richard King, J. M. Guineson, T. O. Williams, C. M. Spaulding, Cha's Harriman, E. C. Ferguson, and Cha's Taylor, good and lawful men, duly qualified electors and house-
28 holders from the body of the district, composed of the King, Kitsap, and Snohomish.

John R. Smith, prisoner held to answer upon the charge of murder, and Michael Marting, prisoner held to answer upon a charge of assault with intent to kill, each by himself, and by his attorneys being present, then and there exercised their right of challenge, and no objections by either of them or by their attorneys being made, the said grand jurors were thereupon accepted as grand jurors on the part of the United States for the present term.

Comes now the grand jury on the part of the United States, A. A. Denny, foreman, into open court in charge of their sworn bailiff, and having answered to their names in their box, present the following indictment, to wit:

29 UNITED STATES OF AMERICA,
Territory of Washington:

In the district court of the United States for the third judicial district

of Washington Territory, holding terms at Seattle for the counties of King, Kitsap, and Snohomish, ss:

At a regular term of the district court of the United States for the third judicial district of Washington Territory, holding terms at Seattle, for the counties of King, Kitsap, and Snohomish, begun and held at Seattle, in the district aforesaid, on the fifteenth day of February, in the year of our Lord eighteen hundred and sixty-nine, it being the third Monday of said month, and the day appointed by law for holding said court:

The grand jurors of the United States, enquiring for and on behalf of the United States, good and lawful men of the district as aforesaid, then and there duly elected, empannelled, sworn, and charged to enquire within and for said district as aforesaid, on behalf of the United States, on their oaths present:

That one John R. Smith, late' employed on the barque Marrinus in the third judicial district aforesaid on the twenty-eight day of
30 April, in the year of our Lord eighteen hundred and sixty-eight, with force, and arms in and on board of the said barque Marrinus, then and there being afloat upon the bay of Port Blakely, third judicial district, Washington Territory, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State of the United States, and within the jurisdiction of this court, in and upon one Edward James Butler, then and there being on board of the said barque Marrinus, feloniously, wilfully, and of his mallice aforethought, did make an assault, and that the said John R. Smith, then and there with a certain instrument of wood, called a capstan bar, which he, the said John R. Smith, in his hands then and there had and held, him, the said Edward James Butler, then and there being, feloniously, wilfully, and of his mallice aforethought, did strike upon the back part of the head of him, the said Edward James Butler, and upon the front part of the head of him, the said Edward James Butler, giving him, the said Edward James Butler, then and there with the capstan bar aforesaid, in manner aforesaid, in and upon the back part of the head of him, the said Edward James Butler, one mortal
31 wound, and in and upon the front part of the head of him, the said Edward James Butler, one mortal wound, of which said mortal wounds the said Edward James Butler, then and there on board the said barque Marrinus, then and there being afloat upon the bay of Port Blakely, third judicial district aforesaid, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State of the said United States, and within the jurisdiction of this court, on the said twenty-eighth day of April, in the year of our Lord eighteen hundred and sixty-eight, did languish, and languishing did live, on which said twenty-eighth day of April, in the year of our Lord eighteen hundred and sixty-eight, the said Edward James Butler, then and there on board the barque Marinus, then and there being afloat upon the bay of Port Blakely, third judicial district aforesaid, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State of the said United States, and within the jurisdiction of this court, of the aforesaid mortal wounds died.

And so the grand jurors aforesaid, on their oaths aforesaid, do say that the said John R. Smith, him, the said Edward James Butler,
32 in manner and form aforesaid, feloniously, wilfully and of his mallice aforethought, did kill and murder, against the peace of

the said United States and their dignitv, and against the form of the statute of the said United States in such case made and provided.

(S'd) JAMES K. KENNEDY,
Acting United States District Attorney.
By *of* LEANDER HOLMES,
United States District Attorney for Washington Territory.

I hereby certify that I have served a true, full, and complete copy (certified by me to be such) of the within indictment on the within named John R. Smith, at half past eleven o'clock, A. M., on the 17th day of February, A. D. 1869.

(S'd) W'M HUNTINGTON,
U. S. Marshall, W. T.

33 (Indorsed:)
United States vs. John R. Smith. Indictment, murder.
A true bill.

A. A. DENNY,
Foreman United States Grand Jury.

Filed in open court in presence of the grand jury this 17th day of February, A. D. eighteen hundred and sixty-nine.

L. B. ANDREWS,
Clerk District Court of the United States.

Witnesses: Collins Steel, John Rosa, G. H. Minot, William Brown, John Morris, John Brisbain, Thomas Osgoog.
Copy.

34 UNITED STATES *vs.* JOHN R. SMITH. } Indictment for murder.

In the United States district court of the 3rd judicial district of Washington Territory, holding terms at Seattle, for the counties of King, Kitsap, and Snohomish.

John R. Smith, defendant in the above action, denies the right of this court to try him upon the indictment herein, and says that the court has no jurisdiction, and moves that the indictment herein be quashed, and that he be discharged from arrest on the warrant issued thereupon, and be permitted to go hence without day.

First. Because it appears by the record of this court, at its August term, 1868, that defendant was indicted for the same offence with which he is charged in this indictment at the said August term, 1868, and that it appears by the records of said court of August term, on page 317, the same was transferred and a change of venue ordered to be made to the said court holding terms at Port Townsend, and that by virtue of the said action of the said court at its last August term, this court transfer'ed its jurisdiction to said court holding terms at Port Townsend, and
35 cannot now exercise jurisdiction over this cause without defendant's consent, which has never been given, and is now positively refused; the said defendant, as appears by the records of said Port Townsend court, objected to the remanding of the case to this court.

2nd. Defendant says that it appears by the indictment, that if any offense was committed, as charged in the indictment, it therein appears to be an offense against the laws of Washington Territory, and not against the laws of the United States.

3rd. Because it appears by the indictment that, if any offense was committed, it was within the boundaries of Kitsap County, W. T., and within the territorial jurisdiction.

(S'd) JOHN R. SMITH.

Subscribed and sworn to before me, the 19th day of Feb., A. D. 1869.

JOHN J. McGILVRA,
Notary Public.

36 (Indorsed:) United States vs. John R. Smith. Motion to quash. Filed Feb'y 17th, 1869. L. B. Andrews, clerk. (Copy.)

37 UNITED STATES } Indictment, murder.
vs.
JOHN R. SMITH. }

A true bill.

A. A. DENNY,
Foreman United States Grand Jury.

UNITED STATES } Indictment, murder.
vs.
JOHN R. SMITH. }

The defendant, John R. Smith, having been personally duly served with a copy of the indictment, and a list of the petit jurors, and being personally present, and by his attorneys, Frank Clark, S. Garfield, and John J. McGilvra, esq'r's, the district attorney, on the part of the United States, James K. Kennedy, esq'r, being also present in open court, the said John R. Smith then and there was duly arraigned, and on such arraignment, answered that he was indicted by his right name, and took time to consider of his defense, and day to plead is given.

38 UNITED STATES } Indictment, murder.
vs.
JOHN R. SMITH. }

Motion, filed by defendant's attorneys, to quash indictment, and plead jurisdiction and plea, which motion was overruled by the court, the defendant being personally present.

Exceptions taken and allowed, and the defendant being personally present, and by his attorneys, Frank Clark, S. Garfield, and John J. McGilvra, esq'r's, and the district attorney, James K. Kennedy, esq'r, on behalf of the United States, and Elwood Evans, esq'r, assisting said prosecution, by leave of court, being also present, the defendant duly entered his plea of not guilty.

Motion for continuance filed by defendant's attorneys, and overruled. Excepted to.

39 UNITED STATES } Indictment, murder.
vs.
JOHN R. SMITH. }

This cause coming on for hearing, the defendant, John R. Smith, being personally present, and by his attorneys, Frank Clark, S. Garfield, and John J. MGilvra, esq'r's, and the district attorney, on the part of

the United States, James K. Kennedy, esq'r, *having* also present, duly came a jury, to wit, Hiram Burnett and eleven others, good and lawful men, duly qualified electors, who were duly elected, tried, and empaneled, when the hour for recess having arrived, the court took a recess until to-morrow morning at nine o'clock.

UNITED STATES } Indictment, murder.
vs.
JOHN R. SMITH. }

This cause coming on for further hearing, the defendant, John R. Smith, being personally present, and by his attorneys, Frank Clark and John J. McGilvra, esq'r's, and the district attorney on the part of the United States, James K. Kennedy, esq'r, being also present, and the jurors having answered to their names in their box, were duly
40 sworn, and the cause proceeded by the hearing of evidence, the arguments of counsel, and the charge of the court, when the jury retired, under charge of a sworn bailiff, to deliberate upon their virdict.

After due deliberation the jury returned into open court, the prisoner, John R. Smith, being present personally, and by his attorney, John J. McGilvra, esq'r, the attorney on the part of the United States, James K. Kennedy, esq'r, being also present, and the jury having answered to their names in their box, present their verdict in words as follows, to wit:

We, the jurors, find the defendant, John R. Smith, guilty of murder, as charged in the indictment.

H. BURNETT,
Foreman.

Defendant, by his attorney, gave notice that they would file motion for an arrest of judgment and sentence, and for a new trial.

By order of the court the prisoner was remanded to prison, till time of sentence.

41 TERRITORY OF WASHINGTON, *County of King, ss:*

In the district court of the United States for the 3rd jud. dist. of said Territory, held at Seattle, in and for the counties of King, Kitsap, and Snohomish.

UNITED STATES } Indictment for murder.
vs.
JOHN R. SMITH. }

And now comes the said def't by his attorneys, Clark and McGilvra, after verdict and before judgment, and moves the court for a new trial & in arrest of judgment.

1st. Because the court excluded proper evidence from the jury.

2d. Because the court permitted improper evidence to go to the jury.

3d. Because the court refused to give to the jury the instructions, seven in number, in writing and on file with the papers in this case.

4th. Because the court gave improper and illegal instructions both written and oral to the jury.

5th. Because the court has no jurisdiction to try this cause, the venue having been changed to Port Townsend.

42 6th. Because the court has no jurisdiction to try this case, as

the place where the alleged killing took place was out of the jurisdiction of this court.

7th. Because the court erred in overruling the plea to the instructions interposed by the def't in the case.

McGILVRA & CLAKK
Att'ys for Def't.

(Indorsed:) The United States vs. John R. Smith. Motion for a new trial & in arrest of judgment, Filed Feb. 22d, 1869. L. B. Andrews, clerk. Considered by the court, and overruled, Feb. 23d, 1869. L. B. Andrews, clerk. Copy.

43 UNITED STATES *vs.* JOHN R. SMITH. } Indictment, murder.

Motion on file for arrest of judgment, and for a new trial duly considered by the court, and overruled, and the ruling excepted to by the defendant, and the defendant, John R. Smith, being personally present, and by his attorneys, Frank Clark and John J. McGilvra, esq's, and the district attorney on the part of the United States, James K. Kennedy, esq'r., being also present, the court pronounced judgment and sentence on the verdict, as follows:

And now, on this twenty-third day of February, A. D. eighteen hundred and sixty-nine, (1869,) the defendant, John R. Smith, being in court, and having been asked if he had anything to say why sentence should not be pronounced upon him on the verdict rendered by the jury, and no sufficient reason appearing why sentence should not be pronounced, it is considered and adjudged by the court, that you, John R. Smith, are guilty of murder, as charged in the indictment, and that you suffer death.

44 That you be taken from this place by the marshall of this Territory to the jail at Steilacoom, in Pierce County, Washington Territory, or to some other place of confinement in the third judicial district, and there confined in prison until the twenty-third (23) day of June, A. D. eighteen hundred and sixty-nine, (1869.)

That, on that day you be taken thence to some convenient place of execution in said county of Pierce, and there be hung by the neck until you are dead; and may He who gave you being, have mercy on your soul.

45 TERRITORY OF WASHINGTON, *County of King, ss:*

In the district court of the United States for the 3rd jud. dist. of said Territory, held at Seattle, in and for the counties of King, Kitsap and Snohomish.

UNITED STATES *vs.* JOHN R. SMITH. } Indictment for murder.

Be it remembered, that, on the trial of the above-entitled cause, the United States, to prove the issue on their part, introduced the following evidence, John R. Rosa, Collins Steel, William Brown, John Morris, Vincent Cawdell, and John M. Brisbain, who, each being duly sworn, testified as follows:

JOHN ROSA.

Edward James Butler, mate of the barque Marinus, and I were at

Port Blakely, on the 28th day of April, 1868; Butler and I went on board the barque, which was at the wharf; after knocking-off time, after six o'clock, we went on the forecastle deck; Butler had both his hands on the rail at the port bow, and was leaning over, giving orders
46 to the men on the wharf to let go a line. He was on one side of me; saw something pass by me and strike Butler on the head; could'nt say what it was; Butler lifted up his hands, let out a deep sigh, and fell backwards across the forecastle deck. Then I saw Smith (identifies the person) on the starboard side with a capstan bar in his hands; I saw him strike Butler a blow with it on the left side of the cheek; then I saw Smith drop the bar and run on shore. I was the first man to lift Butler up; Collins Steel helped me; Butler's eyes rolled after that. He never spoke; he might have breathed some; thought him kind of fainted. Captain Renton and Smith came fifteen minutes afterwards. Smith was with him (Renton) and had a bottle of camphor; Renton said it was no use, he is dead. He (Butler) was dead; I stood a little behind Butler, ready to haul the line; we were hauling a stage up; Smith was behind me lending a hand. The second blow was struck with a capstan bar. (A capstan bar was produced and shown witness.) It was like that, all on board were like that; they were of the same size and weight.

Cross-examined:

47 Says he shipped on board the 9th of March, and sailed about a week after; was on the vessel one and one-half months as seaman. Butler was mate. I was 5 or 6 weeks on board. Smith shipped as sound pilot and stevedore; there was quarreling after we came up the straits; had angry words; the first trouble was off Port Discovery; the captain was in the cabin at the time; the vessel was in ballast trim; a squall struck us; Smith was on the poop-deck; he told me to let go the topsail haliards. Butler took it out of my hands, would not allow me to let go. Butler says, "What the hell do you mean to do with the ship?" Did not hear Smith make any answer.

(The attorney for the defense asked the witness the following question: "Did Butler, the deceased, state that during the difficulty below, on the passage up off Port Discovery, or did any one else state in his presence that Smith, the defendant, took from him (Butler) a slung-shot?" To which question the U. S. objected, and the court sustained the objection; to which ruling the defendant then and there excepted.)

48 Witness further says: Smith asked the captain if he should have charge of the ship. The captain says yes, he could. Did not see or hear any more trouble. One night after, off Port Madison, Smith made some remarks about the head lands. Butler made a kind of sneering laugh. Smith wanted to know what he was laughing at. Smith said "You are trying to make a fool of me." The next trouble was the day before we got into Port Blakeley. Smith was giving orders to tow the ship into port. Butler would not let the men go into the boats. The captain told the men to go into the boats. Don't know of any other trouble until about 4 o'clock in the afternoon of April 28th. Was on the wharf at that time passing lumber down the shoote. The vessel was not straight with the shoote. Butler was on the wharf taking account of lumber. Smith came on deck with his gang of men to heave on the lines. The mate interfered, and said, "Don't be breaking the line." Smith gave no answer. Butler says, "Don't be parting those
49 lines." Heard Smith say, "Part my ass." Butler says, "You son of a bitch," or, "You son of a whore," or, "You long whore's ghost, come on the wharf; I am enough for you," or, "man enough for

you." Smith did not give any answer; did not hear any more of it. Was acting under mate's orders after six o'clock. Smith was engaged hauling up stage or shute. Mate was there, and hold of the fall or rope. Don't know that Butler made any threats towards Smith during the voyage.

Question by att'y for defendant, to wit: "Was Butler reported on board barque Marrinus as a violent, quarrelsome, and dangerous man?"

(Objected to, and sustained by the court; to which ruling of the court the defendant then and there excepted.)

Question by attorney *by* defendant. Had the deceased a slung-shot on board the bark Marrinus at the time of the affray referred to?

(Objected to and sustained; which ruling of the court the defendant then and there excepted.)

Vessel was at Blakely wharf five or six days before the affray.

COLLIN STEEL, witness for prosecution, testifies and says:

50 That he was on board barque Marinus the 28th day of April, sometime in the afternoon of the same day, about 4 o'clock. Smith was pilot and stevedore. Butler and Smith had a jaw about a line.

(The following questions were asked by the U. S. attorney, to wit: Did you hear any conversation at 4 o'clock on the 28th day of April, 1868, between Smith, the defendant, and a man on the wharf? (which was objected to by the defendant, but the court overruled the objection and permitted the question to be asked; to which ruling of the court the defendant then and there excepted.)

Ans. Heard some one on the wharf; thought it was Butler; heard Smith and a man on the wharf. The man on the wharf said, "Don't part the line." Smith says, "Part my ass." The man on the wharf says, "Come on the wharf; I am your man." Smith says, "If I had my knife I would cut your heart out." I took the men to be Smith and Butler. I was at work; went back into the hold again with Smith; heard Smith make threats; told me to wait until after six o'clock

51 and see what he would do to the mate. I understood from Smith's talk that he was to have a fight. Butler was leaning on the rail on the topgallant forecastle; saw Smith walk over behind Butler with capstan bar, and strike him on the back part of the head. Butler fell back. Then Smith struck him over one eye; could not see which one. Smith and I had been at work together; had my eyes on Smith from the time he had the capstan bar until he struck Butler. The bar produced looks like the one he struck with.

Cross-examined:

Don't recollect whether I testified or told any one before about the cutting out of hearts, &c., &c.; was heaving on the capstan at the time of the jaw; supposed it was Butler on the wharf; know it was Smith; was at work by the day on the vessel; I testified at Steilacoom in this case; believe I there testified about the cutting of heart, &c.; can't say that Mr. Lombard asked me about the cutting out of heart, &c.

WILLIAM BROWN, witness for the prosecution, testified:

52 He was in the hold of the barque Marinus on the 28th of April last; Smith stated before me that he would fix Butler after six o'clock so he could not tally any more lumber; it was about three o'clock in the afternoon; did not see Smith strike Butler; saw Butler lying on the forecastle, after six o'clock, dead; could not see the wound

on the back part of his head. I helped bring Smith once in the boat; he said that he was not sorry, that he would kill any man that would call him a son of a bitch. The barque Marinus was lying at the wharf at Port Blakely, in the 3rd judicial district of W. T., April 28th, 1868.

Cross-examined by atttorney for defendant:

I was not at work on board said barque; was not acquainted with either Smith or Butler; the conversation in the hold was addressed to me—stood amidships, by the main hatch; Steel was the first man that came down; said there was a fuss on deck, and they called one another names; some one of the men came down next; one said if he was
53 in Smith's place, he would go up on the wharf and have it out with the mate. John Morris asked Smith, while coming over in the boat, "Are you sorry?" Smith said "No; I would kill any man who would call me a son of a bitch." Smith said if Butler had kept away from him it would have been all right in the morning; all that he had testified he could remember well; saw Butler on board; don't know what Butler's nationality was; think the vessel was a foreign vessel; don't know that Butler was an Irishman.

JOHN MORRIS, witness for the prosecution, testified:

That he was on board the bark Marinus on the 28th of April; saw defendant then; he had words with the mate; mate wanted Smith to haul the lines taut; Smith took his men and went to hauling the lines taut; mate wanted to know what he was doing; Smith said looking after the lines; Butler then called him a damned son of a bitch, or a son of a whore, and called Smith out on the wharf; Smith told him if he had a knife he would go out on the wharf and cut his damned
54 heart, or heart out; it was about three o'clock same day; was in the hold after that; Smith said didn't want us to leave till after six o'clock; he would put Butler in a shape that he couldn't do anything more on that ship. I expected there would be trouble; saw Smith pick hand-spike or capstan bar, and put it on the pin rail. Butler came on board and walked opposite Smith. Smith stood and watched me while I let go the lines. Butler was leaning over the rail. I was on the wharf the same time; saw the mate's cap fall overboard; saw Butler fall back; was about 31 feet from Smith; saw no blow struck, but heard the blow and the noise of a man falling.

Cross-examined by defendant:

Not acquainted with Butler; think she was an English bark; told Mr. Kennedy some things I could testify to; there was 4 witnesses at the room last night; answered questions as far as I know to Mr. Kennedy. I testified before the coroner's inquest; did testify that Butler told Smith if he (Smith) did not mind his own business he would
55 break his dam head; it was said while taking out ballast; did not advise Smith to go on shore and fight with Butler.

Recalled by the United States:

Says no other witness was present when Kennedy questioned me.

JOHN M. BRISBAIN, witness for the prosecution, testifies and says:

He was at Blakely the 28th of April last. Saw J. R. Smith there, and saw Butler, dead. Was at the hotel myself. Capt. Arey and the capt. of the Marinus was going from hotel towards wharf or mill. We met Smith. He said to me and Capt. Arey that the best thing for him to do was to run. It was soon after the murder. Smith said while coming

over in the boat as there was nobody ever hung in the Territory yet, he was not afraid.

Cross-examined by defendant:

Was at Blakely hotel at the time of the murder. It was about ¼ of of a mile from where the bark lay. The capt. of the bark, Capt.
56 Arey, and William Brown went with me on the way to the bark. Saw Smith going into Capt. Benton's house. Smith came out of the house and went back to the vessel. On his way met the capt. of the bark. Smith said it was time for him, Smith, to run. Went on board with the captain of the bark. Smith had a bottle of camphor in his hand. I did not tell Smith he had better get into the woods. Could not say that he knew that Smith and Butler had any trouble.

The defendant, to prove the issue on his part, then called the following witnesses, who were duly sworn, and testified as follows:

VINCENT CARDETT testified:

That he was 2nd mate of the bark Marinus, from San Francisco, Cal., to Port Blakely, and was acquainted with the mate and Smith. Witnessed the signature of the captain to the agreement between the captain and Smith. The Marinus was an English bark. Could not tell by Butler's talk that he was an Irishman. Saw his papers and
57 knew by them he was an Irishman. There was no trouble until off Wilson Point—there was a kind of quarrel. Never knew Butler was in waiting for Smith with a slung-shot; knew that he had one over his trunk.

The defendant, after proving the execution of, offered in evidence, an agreement between John R. Smith, the defendant, and Capt. G. B. De Angeline, in the words and figures following, viz:

SAN FRANCISCO, *Mar. 21st*, '68.

It is this day mutually agreed between John R. Smith, stevedore, of the first part, and Capt. Givel B. De Angeline, master of the bark Marinus, of Liverpool, of the second part, that the said John R. Smith pilot the from this port to her moorings at any port or ports on Puget Sound, and then stow the entire cargo of lumber to the master's satisfaction; and, after the ship is loaded, to pilot the said vessel back as far as Port Townsend, when his contract expires. For which
58 said services the said Givel B. De Angeline, master of the bark Marinus, agrees to pay to the said John R. Smith the sum of one hundred and eighty dollars, U. S. gold, as soon as the vessel is loaded and anchored at Port Townsend. And the said John R. Smith agrees to accept the said amount as sufficient remuneration for his services in full from all demands.

(Signed) JOHN R. SMITH,
G. B. DE ANGELINE.

Witness—
(Signed) G. MANTOR.

Mrs. RENTON, who, being first duly sworn, testifies as follows:

Says she first defendant at Port Blakely. He came into my house wanting a bottle of camphor. Said he was in a great hurry. I asked him what he wanted it for. He said a man was about killed; he feared the man would die. I asked who done it. He pointed to himself. I asked him what he had done it for. He said the man had called him out of name. He went off with the camphor.

COLLINS STEEL, recalled by defendant, says:

59. He don't know what countryman Butler was; saw some of his papers, and they showed he was from Waterford, Ireland.

JOHN R. ROSA recalled by the defendant:

Don't know what countryman Butler was; never saw his papers; he spoke very good English.

The coroner's inquest, in the words and figures following, was given to the jury by consent, as evidence in the case, *in the words and figures following*, viz:

We, the undersigned jurors, do come to the conclusion, that Edward James Butler, native of Waterford, Ireland, and mate of the bark Marinus, at Port Blakely, came to his (death) from wounds received by capstan bar, in the hands of John R. Smith, on the 28th day of April, 1868.

MICHAEL KELY,
R. KING,
M. J. LEWIS,
A. P. SPAULDING,
C. SHOEMAKER,
A. W. ARNOLD,
Jurors.

And this was all the evidence in the case.

60 Evidence was also given tending to show that Smith went on deck at six o'clock in advance of Butler, picked up a capstan bar, laid it on the pin rail and stood by it until Butler came on deck and was leaning over the rail of the ship with his back towards Smith.

DENNISON, *Judge.*

UNITED STATES }
vs.
JOHN R. SMITH. }

Charge of the court.

The court then charged the jury as follows:

GENTLEMEN OF THE JURY: I will first direct your attention to the legal effect of the agreement in writing, which is in evidence, by which the defendant was employed to act as pilot and stevedore of the bark Marinus.

And in the first place, I say to you, that said agreement did not invest John R. Smith, with absolute and exclusive control of the vessel during the voyage from San Francisco to Port Blakely, and thence
61 to Port Townsend. Smith's authority as pilot was subordinate to that of the master, and might be supplanted whenever, in the opinion of the master, the safety of the vessel demanded it.

In the next place, when the vessel arrived at her moorings in Port Blakely, the authority of Smith as pilot ended until she was loaded and again ready for sea.

While the vessel was lying in port and loading, Smith's duties and authority were confined to the stowing of her cargo, and his authority as pilot was wholly suspended.

But it does not matter very much how extensive the authority of Smith as pilot during the voyage may have been, because any interfer-

ence with his authority by the deceased affords no justification, excuse, or provocation for the crime with which the defendant is charged in the indictment.

Nor does it matter whether the deceased was a violent and dangerous man or not, or whether he was in the habit of carrying a slung-shot or not, until it is shown that he made or was attempting to make an
62 attack upon the defendant at the time of the homicide.

I will now call your attention to the statute of the United States under which the defendant is indicted and the law applicable to the offense charged in the indictment.

The statute is found in Brightly's Digest, page 209, section 36.

The statute under which the defendant is indicted declares the punishment, but does not define the crime of murder.

It does not tell us what constitutes murder; we must therefore look to the common law for the definition of the crime.

Murder at common law is the killing of a human being with malice prepense or aforethought, either express or implied by law.

Of this description, the malice prepense or aforethought is the chief characteristic, the grand criterion by which murder is to be distinguished from any other species of homicide.

The term malice prepense or aforethought is not to be understood as meaning hatred, enmity, or revenge against the person killed, but
63 as meaning that the act was attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, a heart regardless of social duty and the consequences of the act.

You will observe from the definition, that the malice requisite to constitute the crime of murder, may be either express or implied by law.

Express malice is when one person kills another with a sedate, deliberate mind, and formed design, such formed design being evidenced by external circumstances showing the inward intention.

Malice is implied by law from any deliberate, cruel act committed by one person against another, however sud'en. Thus, if a man wilfully poisons another, or does any similar act producing death sud'enly, in such a deliberate act the law presumes malice, though no particular enmity can be proved.

I also say to you that all homicides *is* presumed to be malicious, and, of course, amounting to murder until the contrary appears from
64 circumstances of alleviation, excuse, or justification, and that it is incumbent on the prisoner to make out such circumstances to the satisfaction of the jury, unless they arise out of the evidence produced against him.

When the defense rests on some violent provocation, it will not avail, however grievous such provocation may have been, if it appears that there was an interval for reflection, or a reasonable time for the blood to have cooled before the deadly purpose was effected.

In determining the question of malice, the jury should take into consideration all the circumstances attending the act of killing and immediately connected with it, such as the nature and extent of the provocation, if any, the time which elapsed between it and the killing, the conduct and relative situation of the prisoner and deceased on the occasion, the weapon used, the opportunity selected, and the manner of killing.

I also say to you that it is of no consequence in this case
65 whether the deceased was a citizen of the United States or a foreigner; if he was a human being, and the defendant murdered him at the time and place, and in the manner alleged, the defendant is answerable to the laws of the United States.

Nor is it of any consequence in this case whether the bark Marinus was a foreign or American vessel.

It is the place where the offense is alleged to have been committed, and not the character of the vessel, that determines the question of jurisdiction in this case.

The offense charged in the indictment is that of wilful murder, and my instructions thus far have been confined exclusively to that offense.

I have purposely abstained from saying anything to you at present in regard to the law of manslaughter.

You will take the case as it now stands, and retire to your room.

After conferring together upon the case as now presented to you, if any of you should have any doubt in regard to the guilt or inno-
66 cence of the defendant of the crime charged in the indictment, or if you should find any difficulty in agreeing upon a verdict, you will come into court, and I will then state to you the law concerning the crime of manslaughter, and whether or not the defendant, under the indictment, can be found guilty of a crime less in degree than wilful murder.

For the present I withhold any further instructions.

(No exception was taken to the charge or any part of it.)

DENNISON, *Judge.*

The defendant then requested the court to give to the jury the following seven instructions:

1st. If the jury believes, from the evidence in the case, that the killing took place upon a sudden quarrel, or in the heat of passion, and
67 not with deliberate and premeditated malice, it is not murder, but manslaughter, and the jury will so find.

2d. Under the indictment in this case the jury may find the defendant guilty of manslaughter if, in their opinion, the evidence justifies such a verdict.

3rd. That if the jury believe the defendant was assaulted or threatened with assault by the deceased, and acted in self-defense, or believes he was so acting, it is not murder, but manslaughter, and the jury will so find.

4th. If the jury have a reasonable doubt as to any fact material in the case to a conviction, they will give the def't the benefit of such doubt.

5th. If the jury believe, from the evidence, that the deceased was not an American citizen, and the vessel upon which the killing took place was not an American vessel, and that the vessel was afloat upon the tide waters of Puget Sound, they will find the defendant not guilty.

6th. If the jury believes, from the evidence, that the deceased was
68 a citizen of Great Britain, and the vessel upon which the killing took place was a British vessel, they will find for the defendant.

7th. The jury are instructed as a matter of law that, under the contract in evidence between the defendant and the master of the bark Marinus, the defendant had the right to the control of the said vessel from the time of leaving San Francisco until she should have arrived at Port Townsend, after being loaded, and that the interfereance, on the part of the deceased, with such control, is a circumstance which the jury will take into consideration in making up their verdict.

(The seven instructions were neither given nor refused, but withheld for reasons appearing in the evidence and charges of the court.

B. F. DENNISON, *Judge.*

Exceptions taken.)

69 Thereupon the jury retired; and, after deliberation, returned into court in about one-half hour and rendered their verdict in words and figures following, viz:

We, the jurors, find the def't, John R. Smith, guilty of murder as charged in the indictment.
Feb. 20th, 1869.

H. BURNETT, *Foreman.*

Thereupon, after verdict and before judgment, the defendant moves the court for a new trial, and in arrest of judgment, which motion is in the words and figures following, viz:

TERRITORY OF WASHINGTON,
County of King, ss:

In the district court of the United States for the 3rd judicial district of said Territory, held at Seattle, in and for the counties of King, Kitsap, and Snohomish.

THE UNITED STATES
vs.
JOHN R. SMITH. } Indictment for murder.

70 And now comes the said defendant, by his attorneys, Clark and McGilvra, after verdict and before judgment, and moves the court for a new trial, and in arrest of judgment:

1st. Because the court excluded proper evidence from the jury.
2d. Because the court permitted improper evidence to go to the jury.
3rd. Because the court refused to give to the jury the instructions—seven in number—in writing, and on file in the case.
4th. Because the court gave improper and illegal instructions, both written and oral, to the jury.
5th. Because the court has no jurisdiction to try the case, the venue having been changed to Port Townsend.
6th. Because the court has no jurisdiction to try this case, as the place where the alleged killing took place was out of the jurisdiction of this court.
7th. Because the court erred in overruling the plea to the jurisdiction interposed by the defendant in this case.

McGILVRA & CLARK,
Att'ys for Defendant.

71 Which said motion was overruled by the court; to which ruling of the court the defendant then and there excepted, and asked the judge to sign the bill of exceptions, which is done in open court, this 23rd day of February, A. D. 1869.

B. F. DENNISON, *Judge.*

(Indorsed:) Filed Feb. 23d, 1869. L. B. Andrews, clerk.

72 TERRITORY OF WASHINGTON,
County of King, ss:

In the district court of the United States for the 3rd judicial dist. of

said Territory, held at Seattle, in and for the counties of King, Kitsap, and Snohomish.

THE UNITED STATES
vs.
JOHN R. SMITH.

Conviction for murder at the February term, A. D. 1869.

Precipe for writ of error.

The judgment upon which the said defendant wishes to bring his writ of error is that of death for murder. The errors assigned are the overruling of his plea to the jurisdiction of said court, and the errors assigned in the bill of exceptions of said defendant, on file in the office of the clerk of said court, among which is: the exclusion of proper evidence from the jury; allowing improper evidence to go to the jury; refusing to give proper instructions to the jury; and the overruling the motions of said defendant for a new trial and in arrest of judgment.

The writ of error will be prosecuted at the next term of the supreme court of said Territory.

The clerk of said court will please issue, under the seal of said
73 court, notice to the prosecuting attorney of said district of the filing of this precipe.

Seattle, W. T., May 29th, 1869.

JOHN J. McGILVRA,
Att'y for Defendant.

74 (Indorsed:) The United States vs. John R. Smith. Precipe for writ of error. Filed May 31st, 1869. L. B. Andrews, clerk. John J. McGilvra, att'y for def't. Copy.

75 TERRITORY OF WASHINGTON,
County of King, ss:

In the district court of the United States for the 3rd jud'l dist. of said Territory, held at Seattle, in and for the counties of King, Kitsap, and Snohomish.

THE UNITED STATES
vs.
JOHN R. SMITH.

Conviction for murder at the February term, A. D. 1869.

Precipe for writ of error.

The judgement upon which the said defendant wishes to bring his writ of error is that of death for murder. The errors assigned are: The overruling of his plea to the jurisdiction of said court, and the errors assigned in the bill of exceptions of said defendant, on file in the office of said court, among which is: the exclusion of proper evidence from the jury; allowing improper evidence to go to the jury; refusing to give proper instructions to the jury; and the giving improper instructions to the jury; and the overruling the motions of said defendant for a new trial and in arrest of judgment.

The writ of error will be prosecuted at the next term of the su-
76 preme court of said Territory.

The clerk of said court will please issue, under the seal of said court, notice to the prosecuting attorney of said district of the filing of this precipe.

Seattle, W. T., May 29th, 1869.

JOHN J. McGILVRA,
Att'y for Def't.

I hereby certify that the foregoing is a full, true, and correct copy of the precipe filed this day in the above-entitled cause.

Witness my hand and the seal of the said district court this 31st day of May, A. D. 1869.

[SEAL U. S. D. COURT.]

L. B. ANDREWS,
Clerk U. S. D. Court.

77 (Indorsed:) United States vs. John R. Smith. Prec. for writ of error. Filed May 31st, 1869. L. B. Andrews, clerk. Copy. John G. McGilvra, att'y for def't.

78 TERRITORY OF WASHINGTON,
County of King, ss:

In the district court of the United States for the 3rd judicial dist. of said Territory, held at Seattle, in and for the counties of King, Kitsap, and Snohomish.

THE UNITED STATES
vs.
JOHN R. SMITH.

Conviction for murder at the February term, A. D. 1869.

To the Hon. B. F. Dennison, judge, &c.:

And now comes the said defendant, by his attorney, John J. McGilvra, and moves the said judge for an order that the writ of error to the supreme court of said Territory shall operate as a supercedeas and stay of further proceedings in said case until the final judgement of said supreme court upon said writ of error.

JOHN J. McGILVRA,
Attorney for Defendant.

MAY 31ST, 1869.

79 TERRITORY OF WASHINGTON,
Third Judicial District, ss:

UNITED STATES
vs.
JOHN R. SMITH. } Murder.

A bill of exceptions having been signed, and a writ of error prosecuted in the above-entitled cause to the supreme court—

It is hereby ordered that the same be allowed, and operate as a supercedeas and stay of proceedings until the further order made in the case by the supreme court.

Given under my hand this 1st day of June, A. D. 1869.

B. F. DENNISON,
Judge of the 3rd Judicial District W. T., and Associate Justice of the Supreme Court.

80 (Indorsed:) Supercedeas. Filed June 4th, 1869. L. B. Andrews, clerk. Copy.

81 I, L. B. Andrews, clerk of the United States district court, holding terms at Seattle, for the third jud. dist. of Wash. Ter'y, embracing the counties of King, Kitsap, and Snohomish, hereby certify that the foregoing are full, true, and complete copies of motions, bill of exceptions, precipe, journal entries, and all papers connected with the foregoing case of The United States vs. John R. Smith, remaining on file and of record in my office at Seattle, this 23d day of Nov., A. D. 1869.

Witness my hand and seal of said court affixed day and date last above mentioned.

{ SEAL OF U. S. D. COURT, 3D DIST. } L. B. ANDREWS, *Clerk.*

82 I hereby acknowledge due service of notice of the prosecution of the writ of error in the within case of John R. Smith vs. The United States.

Nov. 1st, 1869.

L. HOLMES,
U. S. Att'y.

83 Supreme court of W. T., Dec. term, 1869.

JOHN R. SMITH *vs.* THE UNITED STATES. } Error to 3rd jud. dist.

And now comes the said pl'ff in error, by his att'ys, McGilvra & Clark, and assigns the following errors:

1st. The court below had no jurisdiction on the United States side thereof, the act of Congress under which the indictment was drawn (act 1790, se. 8) not applying to Port Blakely, the place of the alleged offence.

2nd. Said court had no jurisdiction in the premises, the case having gone to another jurisdiction by change of venue.

3rd. The court erred in excluding proper evidence from the jury, and in allowing improper evidence to go to the jury.

4th. The court erred in giving improper instructions to the jury, and in refusing to give to the jury proper instructions asked for by the pl'ff in error.

5th. The court erred in overruling the pleas to the jurisdiction and the motion for a new trial, and in arrest of judgment.

McGILVRA & CLARK,
Att'ys for Pl'ff in Error.

84 (Indorsed:) Supreme court, W. T. John R. Smith, pl'ff in error, vs. The United States, def't in error. Assignment of error.

85 (Indorsed:) Supreme court. John R. Smith vs. The United States. Error to 3rd dist. Filed Dec. 6th, 1869. A. W. Moore, clerk.

86 UNITED STATES OF AMERICA,
Territory of Washington, ss:
Supreme court of Washington Territory.

Be it remembered that, on the 6th day of December, A. D. 1869, the

same being the first day of the December term, among other things the following proceedings were had, viz:

JOHN R. SMITH, PL'FF IN ERROR,
vs.
UNITED STATES, DEF'T IN ERROR. } Indictment for murder.

Come now the plaintiff, by his attorney, J. J. McGilvra, esq'r.; comes, also, the defendant, by Leander Holmes, esq'r., who prosecutes in behalf of the United States; and plaintiff's counsel asks that this cause be continued, and, after argument of counsel, motion was overruled.

87 And afterwards, to wit, on the 13th day of December, A. D. 1869, the same being the 7th day of said term, among other things the following proceedings were had, viz:

JOHN R. SMITH, PL'FF IN ERROR,
vs.
UNITED STATES, DEF'T IN ERROR. } Indictment for murder.

Comes now the parties, by their attorneys, and, after argument of counsel, the cause was submitted to the court.

88 And afterwards, to wit, on the 14th day of December, A. D. 1869, the same being the 8th day of said term, among other things the following proceedings were had, viz:

JOHN R. SMITH, PL'FF IN ERROR,
vs.
UNITED STATES, DEF'T IN ERROR. } Indictment for murder.

The court announced to the counsel in this cause that the judgement below is affirmed, without giving an opinion at this time.

89 JOHN R. SMITH, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR.

Supreme court, December term, 1869.

This case comes up on a writ of error to the district court of the United States in and for the third judicial district of Washington Territory, holding terms at Seattle, for the counties of King, Kitsap, and Snohomish.

The history of the case is briefly this:

At the August term of said court, A. D. 1868, John R. Smith was indicted by the grand jury, acting on behalf of the United States, for the murder of one Edward James Butler (mariner) on the 28th day of April, 1868, the said Edward James Butler, as was alleged, being then and there on board of a certain bark called the "Marinus," riding at anchor below low-water mark on the high seas, out of the jurisdiction of any particular State, and within the admiralty and maritime jurisdiction of the United States," &c.

90 On being arraigned, and before pleading to the indictment, the defendant, John R. Smith, on the 19th day of August, filed an affidavit asking for a continuance of the case and a change of venue to Pierce County.

81 I, L. B. Andrews, clerk of the United States district court, holding terms at Seattle, for the third jud. dist. of Wash. Ter'y, embracing the counties of King, Kitsap, and Snohomish, hereby certify that the foregoing are full, true, and complete copies of motions, bill of exceptions, precipe, journal entries, and all papers connected with the foregoing case of The United States vs. John R. Smith, remaining on file and of record in my office at Seattle, this 23d day of Nov., A. D. 1869.

Witness my hand and seal of said court affixed day and date last above mentioned.

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84 (Indorsed:) Supreme court, W. T. John R. Smith, pl'ff in error, vs. The United States, def't in error. Assignment of error.

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86 UNITED STATES OF AMERICA,
Territory of Washington, ss:
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Be it remembered that, on the 6th day of December, A. D. 1869, the

same being the first day of the December term, among other things the following proceedings were had, viz:

JOHN R. SMITH, PL'FF IN ERROR,
vs.
UNITED STATES, DEF'T IN ERROR. } Indictment for murder.

Come now the plaintiff, by his attorney, J. J. McGilvra, esq'r.; comes, also, the defendant, by Leander Holmes, esq'r., who prosecutes in behalf of the United States; and plaintiff's counsel asks that this cause be continued, and, after argument of counsel, motion was overruled.

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The history of the case is briefly this:

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90 On being arraigned, and before pleading to the indictment, the defendant, John R. Smith, on the 19th day of August, filed an affidavit asking for a continuance of the case and a change of venue to Pierce County.

There is nothing of record showing that the court ever acted on this application, but the journal entry states that "according to the agreement the defendant, in person and by attorney, with the attorney of the United States, made in open court, this cause is ordered to the next term of the United States district court at Port Townsend."

At the September term of court at Port Townsend, the following order was made:

"Ordered by the court, that the case of the United States vs. John R. Smith, take precedence in trial of the case of The Territory of Washington vs. John R. Smith."

The defendant then interposed a plea to the jurisdiction of the court, to which the U. S. attorney filed a demurrer, admitting "that the crime charged was committed on board the bark Marinus while riding
91 at anchor in the bay of Port Blakely, below low-water mark, and that said vessel was being loaded with lumber."

The plea to the jurisdiction is not sent up to this court, and it does not appear what the plea contained.

The court sustained the demurrer and held the plea to the jurisdiction insufficient; to which ruling of the court the defendant excepted.

On motion of the attorney for the United States the court then ordered the prisoner to be placed in the custody of the U. S. marshall. The case he remanded to King County for trial, "and that he there be placed in his original position in regard to his plea and defence."

To this *also* the defendant also excepted, and the case was sent back to the court at Seattle, in King County.

At the ensuing term of court at Seattle, the defendant "on the 17th day of February 1869, filed a motion "protesting against the jurisdiction" of that court on the grounds that a change of venue was regu-
92 larly taken from that court to the U. S. district court at Port Townsend, and asked the court "to remand the case to Port Townsend for trial."

Pending this motion the grand jury, on behalf of the United States, returned into court a new indictment against the defendant for the same offense, (he having been previously brought into court and exercised his right of chal'enge,) whereupon the acting attorney for the United States entered a "nolle prosequi" on the old indictment.

This was on the 17th day of February, 1869.

On the same day a copy of the new indictment was served on the defendant, and on the 19th he filed a motion to quash the indictment, alleging that the court had no jurisdiction by reason of the former change of venue. That the offense was committed, if at all, within the boundaries of Kitsap County, and was an offense against the laws of the Territory, and not against the laws of the United States, &c.

The motion to quash having been overruled and exceptions
93 taken, the defendant, on arraignment, pleaded not guilty, and the case proceeded to trial, resulting in a verdict of guilty of murder as charged in the indictment.

The defendant thereupon filed a motion in arrest of judgment and for a new trial, which, being overruled and exception taken, the court on the 23rd day of February, 1869, pronounced judgement and sentence of death; from which a writ of error is prosecuted to this court.

The errors assigned are as follows:

1st. The court below had no jurisdiction on the United States side thereof, the act of Congress under which the indictment was drawn (act 1790, sec. 8) not applying to Port Blakely, the place of the alleged offense.

2nd. Said court had no jurisdiction in the premises, the case having gone to another jurisdiction by change of venue.

3d. The court erred in excluding proper evidence from the jury, and in allowing improper evidence to go to the jury.

4th. The court erred in giving improper instructions to the jury, and in refusing to give to the jury proper instructions asked for by the plaintiff in error.

94 5th. The court erred in overruling the pleas to the jurisdiction and the motion for a new trial, and in arrest of judgment.

Before proceeding to consider these alleged errors it may be well to notice some points *made* in the argument *made* by the counsel for the prisoner.

In the first place it was claimed that the indictment is drawn under sec. 8 of the act of Congress of April 30, 1790.

This is a mistake; under whatever act of Congress the original indictment may have been drawn, it is very evident that the indictment on which the prisoner was tried and convicted was drawn under sec. 4 of the act of March 3, 1825. The language used in the indictment in describing the locality of the offense charged, precludes any other supposition.

The locality is alleged to have been "on board the bark Marinus then and there being afloat upon the bay of Port Blakely," * * * "within the admiralty and maritime jurisdiction of the United States," and "out of the jurisdiction of any particular State," &c.

95 But it is said that the act of 1825 was intended to limit and restrict the act of 1790. It is a sufficient answer to this to say that the act of 1825 is entitled "An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes."

We have no hesitation in saying that the act of 1825, as well as the subsequent acts of 1835, 1846, 1857, &c., relating to crimes and punishments, instead of being restrictive, were intended to enlarge the criminal jurisdiction of courts of the United States.

In the case of The United States vs. Roberts, 2 N. Y. Leg. Obs., p. 99, decided in 1843, the circuit court said: "Under the act of *of* March 3, 1835, enlarging the criminal jurisdiction of courts of the United States, those courts have jurisdiction to try for offenses committed anywhere upon tide-waters." See also United States vs. Lynch, 2 N. Y. L. O., p. 51. Another point relied upon by counsel for the prisoner was the place where the offense was committed, is within geographical boundaries of Kitsap County, which embrace, as is claimed, a large

96 portion of the bay of Port Blakely, and that the territorial legislature has competent authority to embrace within the boundaries of counties of the waters of Puget Sound, Admiralty Inlet, and all south of the middle of Fuca Straits, thereby excluding the courts of the United States from the exercise of jurisdiction over offenses or wrongs committed against persons or property on these waters.

No authorities were cited in support of this position, and we fail to see any force in the argument, except that it proves too much.

That marine torts and injuries, committed on tide-waters within the body of a county, are within the jurisdiction of the courts of the United States. (See 10 Wheaton, p. 428; Olcock's R., p. 329; 8 Law Rep., p. 275; 2 Gall. R., p. 400.)

97 The position taken by counsel to the effect that the organic act of the Territory operates as a repeal of the acts of 1790 and 1825 is too palpably untenable to require refutation by this court.

Another point made in the argument was that the district courts of the Territory are not courts of the United States.

Upon this point we find no difficulty in agreeing with the opinion expressed by the supreme court of Minnesota, in Chouteau vs. Rico, (1, Minn. R., p. 192) That court said, "District courts of a Territory are not district courts of the United States, according to the usual acceptation. Still the territorial courts, in a qualified sense, may be designated as United States courts.

"They are United States courts, because they are created by authority of the United States."

We will now proceed to consider the various alleged errors in the order in which they are assigned.

And first as to the jurisdiction of the court in which the pris-
98 oner was tried and convicted.

The organic act creating the district courts of the Territory, and conferring judicial powers upon them, declares that "each of said district courts shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States; and also, of all cases arrising under the laws of said Territory and otherwise."

These courts, then, exercise in the Territory the combined powers of the circuit and district courts of the United States.

For the purposes of this case it is conceded that the United States have no unwritten criminal code to which resort can be had as a source of jurisdiction, and that the case must come within some statute of the United States, describing the offense and declaring the punishment.

The statute under which the indictment is drawn, is sec. 4, of the act of Congress of March 3, 1825, (Stat. at Large, p. 115, vol. 4,) and reads as follows:

99 "That if any person or persons upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty or maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, shall commit the crime of wilful murder * * * * * every person so offending shall be deemed guilty of felony, and shall, upon conviction thereof, suffer death."

To bring a case within this statute, the offense must be committed upon the high seas, or in an arm of the sea, or in a river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State.

Does the present case come within the language and meaning of this statute?

The indictment alleges the offense to have been committed "on board the bark Marinus afloat on the bay of Port Blakely," a bay putting in from Puget Sound, which is, in common law acceptation, an arm
100 of the sea; as much so as is Long Island Sound. Speaking of "an arm of the sea," Story, J., says, "an arm of the sea may include various subordinate descriptions of waters where the tide ebbs and flows. It may be a river, harbor, creek, basin, or bay, and it is sometimes used to designate very extensive reaches of waters within the projecting capes or points of a country." (U. S. vs. Grush, 5; Mason's R., p. 290.)

Puget Sound, then, with its multitude of inlets, havens, harbors, and bays, may properly be held to be an arm of the sea.

But, leaving this line of argument for the present, this court has no hesitation in holding that the bay of Port Blakely, where the bark

Marinus was lying at the time the offense was committed, is within the admiralty and maritime jurisdiction of the United States.

In the case of the "Lotty," (Olct. R., 325,) the court said, "Ad-
101 miralty has jurisdiction of collisions occurring on tide-water though the vessel be at a wharf in harbor."

So in 10th Wheaton, p. 428, the court say: "A case of collision where the tide ebbs and flows is within the admiralty jurisdiction of the United States, even though the locality be within the body of a county."

See also, United States vs. Wilson, 3 Blatchf., 435; 5 How., 441; 12 ib., 444; 20 ib., 296; 22 ib., 48.

In The United States vs. Lynch, (2 N. Y. Leg. Obs., p. 51,) the court said: "Under the act March 3, 1835, prescribing a penalty for an endeavor to make a revolt on board ship, the jurisdiction of the circuit court extends to all places and waters where the tide ebbs and flows."

Again: "In cases of torts, injuries, and offenses, the locality brings them within the admiralty jurisdiction." Gilpin's R., p. 524. See
102 also, United States vs. Combs, 12 Peters R., p. 72; 1 West Laws, s. 444, (circ't c't, Ga.)

But, under sec. 21, act of 1825, the locality of the offense must also be "out of the jurisdiction of any particular State."

Is the Bay of Port Blakely out of the jurisdiction of any particular State?

Of this there would seem to be no room for doubt.

A Territory is not a State; nor are the words "Territory" and "State" used as synonymous or convertible terms in the acts of Congress.

For instance, in 1853 Congress passed an act regulating fees and costs in "the several States."

By act of 1855, Congress extended the provisions of the act of 1853 to the Territories, "as fully in all particulars as they would be had the word Territories been inserted after the word States," and the act had read "in the several States and Territories of the United States." See Brightly's Digest, p. 273 & 279.

103 Again, in 1789 Congress passed an act adopting the pilot laws "of the States respectively," and in 1866 an act declaring that no regulations shall be adopted by "any State" making discrimination in the rates of pilotage, &c.

Can it be claimed that the word "State" in these acts embraces Territories?

Besides, a Territory sustains no such relation to the Government of the United States as does a State. The several States of the Union possess all the powers and attributes of independent nations, except such as they have delegated by the Constitution to the United States. Not so with a Territory.

But even the decission in the Bevans case proceeds upon the ground that Congress had the power and may at any time, by legislation, give to the Federal courts jurisdiction over offenses committed in Boston Harbor, but has abstained from doing so out of regard to the claim of sovereignty long exercised by the State of Massachusetts over those waters.

104 Again, in construing statutes, words are to have their ordinary meaning. 16 How., 251; 4 McLean, 463.

"Acts of Congress are to be construed by interpreting the words in their plain and actual meaning." C't of Claims, Der. R., p. 157, 158.

But the words of the statute under consideration have received a judicial construction:

"The words 'out of the jurisdiction of any particular State' means

any particular State in the Union." U. S. vs. Furlong, 5 Wheaton, p. 134.

So in the case of The United States vs. Pirates, (5 Wheaton, 184–200,) the court said:

"The words 'out of the jurisdiction of any particular State,' in sec. 8 of the crime act of 1790 must be construed to mean out of any one of the United States."

So also "a 'State' must be a member of the Union; it is not
105 enough to be an organized political body within the limits of the Union." 5 How., p. 343, 377; 5 Pet., p. 1, 18; 2 Cranch, p. 445.

Other authorities might be cited upon the general question of jurisdiction in this case if it was deemed necessary.

For instance, "the provisions of the Constitution which prescribe the limits of the judicial power of the United States, restrict the jurisdiction of the States only, and do not apply to the Territories." 1 Pet., p. 511.

And again, "Long Island Sound is not only, in common law accep a-tion, an arm of the sea—it is a strait, and parcel of the high seas; and it is not within the territorial limits of any particular State." See 4 Buris' R., p. 2162; 20 Johns, p. 98; Olcoks' Adm. R., p. 18.

Our opinion, then, is that the court below had jurisdiction.

106 We do not, however, intend to say that the prisoner might not have been indicted and punished under the statute of the Territory.

There may have been a concurrent jurisdiction.

Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for any infraction of the laws of either. The same act may be an offense against the laws of both. See 14 How., p. 13; 1 Oregon R., 191; 5 How., 432; 9 ib., 560.

But the question of concurrent jurisdiction is not before us, and we express no opinion upon it.

The 2d error assigned is want of jurisdiction by reason of the change of venue.

A sufficient answer to this is that the entry of nol. pros. on the
107 18th day of Feb., 1869, after the new indictment was found, cured any errors or defects which may have existed in the previous proceedings.

That it is competent for the prosecuting attorney to enter a nol. pros. at any time before verdict, see U. S. vs. Stowell, (2 Curtis C. C. 153;) and U. S. vs. Peterson, (1 Woodb. & M., 305.)

Errors which have worked no injury to a defendant cannot be complained of in a court of review.

The 2d error assigned relates to the exclusion of proper evidence and the admission of improper evidence.

The evidence excluded appears to have been offered for the purpose of showing that Butler, the deceased, was "reported" to be a "violent, quar'elsome, and dangerous man," and that "he had a slung-shot on board the bark Marinus at the time of the affray."

It nowhere appears in the evidence that Butler, at the time of
108 the affray, was making an assault upon the prisoner, or attempting or threat'ning to make any.

On the contrary, it appears that Butler was leaning over the ship's rail, with his back towards the prisoner, at the time he was approached and struck on the back of the head with the capstan bar by the prisoner.

There is some evidence showing that previously opprobious and insulting epithets had been applied to the prisoner by the deceased.

Upon this state of facts we cannot entertain a single doubt that the proposed evidence was properly excluded.

On the trial of an indictment for homicide, evidence to prove that the deceased was well known and understood generally by the accused and others, to be a quar'elsome, violent, and savage man, is inadmissable. In the eye of the law, to murder the vilest and most abject of the human race is as great a crime as to murder its greatest benefactor.

109 Whart. Am. Crim. Law, p. 295 & 296, (3d edition;) 14 Maine Rep., 248; 9 Metcalf R., 110; 3 Joudell R., 424.

Again: "Words of reproach, how grievous soever, are not provocation sufficient to free the party killing from the guilt of murder, nor are contemptuous or insulting actions or gestures, without an assault upon the person.

"This rule governs every case where the party killing upon such provocation made use of a deadly weapon." (Cona vs. Webster, 5 Cranch, 295; State vs. Barfield, 8 Jovdell, R. 344; 8 Cal. R., 441.)

The evidence objected to by the accused, and admitted by the court, was in answer to this question put to the witness, Collins Steel:

110 "Did you hear any conversation at 4 o'clock on the 28th day of April, 1868, between Smith, the defendant, and a man on the wharf?"

This conversation had already been detailed by the witness, John Rosa, on cross-examination by the prisoner's counsel, and was a conversation between Smith and Butler. See cross-examination of John Rosa, and the answer given by Collins Steel.

We think the evidence was properly admitted.

The 4th error assigned, is the giving of improper instructions to the jury, and the refusing to give others asked for by plaintiff in error.

The instructions given are contained in the charge of the court, to which no exception was taken at the time, and consequently no objection thereto can be made at this time. 3 How., 553; 5 McLean, 218; 12 Pet., 102; 11 Pet. R., 105; 1 Parker's Crim. R., 424.

111 Besides, the record contains the charge of the court below at length, and there is nothing in the record to show wherein or in what part it is claimed to be objectionable. See 4 Pet., p. 1; 1 Parker's Crim. R., p. 272.

The instructions asked for, and alleged to have been refused, are 7 in number.

The bill of exceptions, signed by the judge, states that "the seven instructions were neither given nor refused, but withheld for reasons appearing in the evidence, and charge of the court."

Counsel for the prisoner claims that if not given, they were "refused." This depends upon the peculiar circumstances under which they were withheld.

The indictment contains only one count charging the statutory offense of "wilful murder."

112 After stating to the jury the law concerning the crime of wilful murder, the judge said: "I have purposely abstained from saying anything to you at present in regard to the law of manslaughter; you will take the case as it now stands, and retire to your room. After conferring together upon the case as now presented to you, if any of you should have any doubt as to the guilt or innocence of the defendant of the crime charged in the indictment, or if you should find any difficulty in agreeing upon a verdict, you will come into court, and I will then state to you the law concerning the crime of manslaughter, and whether or not the defendant, under the indictment, can be found guilty of a

crime less in degree than wilful murder. For the present, I withhold any further instructions."

The jury retired, and came back into court, in about one-half
113 hour, with a verdict of "guilty of murder, as charged in the indictment." And what was the state of the evidence upno which the case was then submitted to the jury?

There was no evidence whatever given or offered even, tending to prove any such provocation *or* would have mitigated the offense charged, or made it anything else in law than wilful murder.

Nor was there any evidence tending to prove a "sudden quarrel," or that the prisoner had been "assaulted," or that he was "acting in self-defense," or "believed he was so acting." (1st Par. Crim. R., p. 154.)

The 1st, 2d, and 3d instructions asked for, relating to the crime of manslaughter, were, therefore, abstract propositions, based upon an assumed state of facts not warranted by the evidence, and were properly withheld from the jury.

"An instruction predicated on a state of facts which the evidence does not tend to establish is abstract, and should be refused, al-
114 though it may assert a correct legal prop osition." (18 Ala. R., p. 727; 20 How. R., p. 252.)

"It is not error for the court to refuse instructions to a jury upon a state of things of which there is no evidence in the case." (1 Oregon R., p. 140.)

Again, "When one charged with homicide relies on an assault by the deceased as extenuating his crime, he must show such assault by satisfactory evidence. The jury must not conjecture, without evidence, that it may have been made." (U. S. vs. Armstrong, 2 Curt. C. C., 446; U. S. vs. McGlen, 1 Curt. C. C., 1.)

The 4th instruction asked for was the usual one in regard to "a reasonable doubt," and is good law in a proper case. In this case the
115 record shows that the jury had no doubt of the guilt of the accused of the crime of murder, having returned their verdict in one-half hour after retiring, and we do not see how the giving of the 4th instruction asked for could have produced a different verdict.

Besides, the court in its charge had instructed the jury on this point quite as favorably as was asked by the 4th instruction, if not more so.

It is well settled that a court is not bound to report to the jury the same substantial proposition of law in different forms. It is sufficient if it be once laid down in an intelligible manner. (6 Pet. R., p. 622.)

It is also true that a court is not bound in every case to instruct a jury that, "if they have a reasonable doubt, &c., they will give the defendant the benefit of such doubt." Nor would it be error in every case to refuse such an instruction. (18 Ala. R., p. 727.)

116 The reason is that the evidence in the particular case may be such as not to call for or warrant the giving of such instruction.

The 5th instruction asked for is not law.

In substance, it requested the court to say to the jury that, if the deceased was not an American citizen, and the bark not an American vessel, &c., they must acquit.

Section 4, act of 1825, reads, "That if any person or persons" on the high seas, &c., "shall commit the crime of wilful murder," &c., "such person, upon conviction, shall suffer death."

Nothing is said in sec. 4 as to the citizenship of the slayer or person slain, nor as to the character of the vessel on which the killing may have taken place. The case of the U. S. vs. Pinctas (5 Wheat., 184) is sufficient authority on this point. (See also 5 Wheat., 412; 1 Kent, p. 393 & 4—note, 8th ed.)

117 The 6th instruction asked for is in effect the same as the 5th, and was properly withheld.

The charge of the court below that, "It is of no consequence in this case whether the deceased was a citizen of the United States or a foreigner," was correctly given.

The 7th instruction asking the court to charge, "That under the contract in evidence the defendant had the right to the control of the vessel from the time of leaving San Francisco until she should have arrived at Port Townsend after being loaded," &c., is not law, and was rightly withheld.

The 5th and last error assigned is the overruling of the plea to the jurisdiction and the motion for a new trial.

We have already disposed of the first question presented in this assignment of error.

As to the second the refusal to grant a new trial, we hold the
118 law to be this:

In the United States courts, the granting or refusing a motion for a new trial on the application of the defendant in a criminal case, is a matter vesting in the discretion of the court. United States vs. Harding, 1 Wall, j'r, 127; United States vs. Keene, 1 McLean, 429.

A refusal of the court therefore to grant a new trial in such cases affords no ground for a writ of error.

The law is the same in civil cases. (4 Wheat, 213–376. 7 ib., 248.

119 On the whole we are unable to discover any error in the records to warrant a disaffirmance of the judgment.

It is therefore considered by this court that the judgment and sentence of the court be, and the same are hereby, affirmed.

And the U. S. marshall of the Territory is hereby authorized and directed to carry said judgment and sentence into execution, according to the terms thereof, on the 28th day of April, A. D. 1870, at the hour of 2 o'clock of said day.

B. F. DENNISON,
Chief Justice.

I concur.

O. JACOBS,
Associate Justice.

120 I, A. W. Moore, clerk of the supreme court of the Territory of Washington, do hereby certify that the foregoing is a full, true, and correct copy of the transcript of the record from the dist. court of the 3d jud. dist., of Washington Territory, held at Seattle, the errors assigned, and journal entries, and opinion and final judgement of said supreme court, embracing all the papers on file in and journal entries of record in my office in the case of John R. Smith, pl'ff in error, vs. The United States, def'ts in error.

In witness hereof I have hereunto set my hand and affixed the seal of said court this 12th day of October, A. D. 1870.

[SEAL.]

A. W. MOORE,
Clerk of the Supreme Court of Washington Territory.
By R. O. DUNBAR,
Deputy.

121 Supreme Court of the United States.

JOHN R. SMITH
vs.
THE UNITED STATES. } In error.

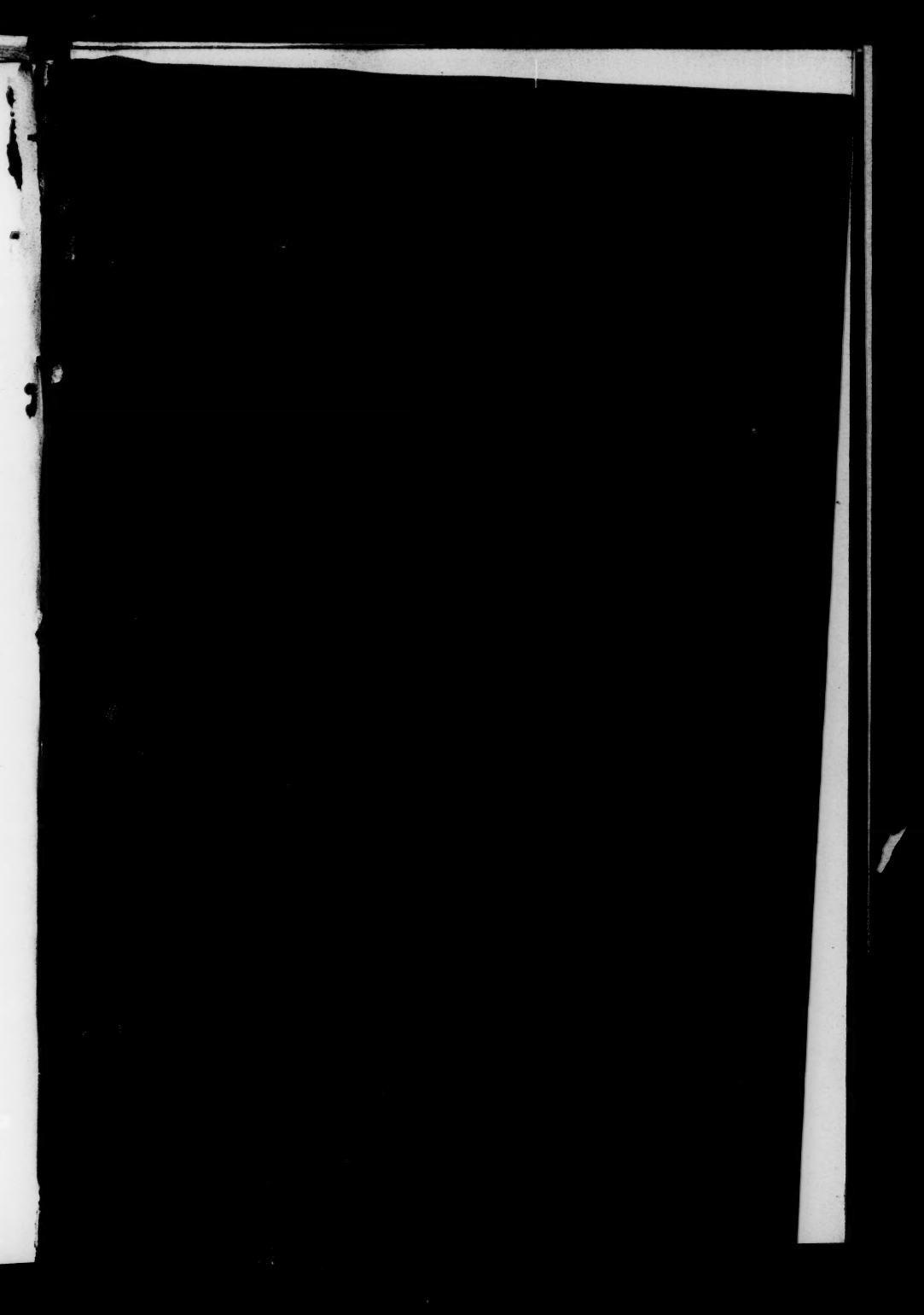
Of the December term, A. D. 1870.

And now, afterwards, to wit, on the first Monday in December, in the term aforesaid, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said John R. Smith, by John J. McGilvra, his attorney, and sayes that the record and proceedings aforesaid, in the supreme court of Washington Territory, there is manifest error in this: that by the record aforesaid it appears that the judgement aforesaid given was given for the said defendants and against the said John R. Smith, whereas, by the law of the land, the said judgement ought to have been given for the said John R. Smith, and the judgement of the district court reversed; and the said
122 John R. Smith prayes that the judgement aforesaid, of the said supreme court of Washington Territory, and of the district court of the 3d judicial district of said Territory may be reversed, annulled, and altogether held for nothing and that he may be restored to all things which he hath lost by the occasion of the said judgements. Pl'ff hereby reassigns all and singular the errors assigned in the supreme court of Washington Territory.

JOHN J. McGILVRA,
Att'y for Pl'ff in Error.

123 (Indorsed:) 1870. Dec. term. No. 453. Supreme Court of the U. S. John R. Smith vs. The United States. In error. Assignment of errors. Filed 29th December, 1870. John J. McGilvra, att'y for pl'ff.

(Indorsement on cover:) No. 453. John R. Smith, plaintiff in error, vs. The United States. Washington Terr'y sup. court. Filed 29th December, 1870.



Supreme Court of the United States.

No. 453.—December Term, 1870.

John R. Smith, Plaintiff in Error, vs. The United States.	In error to the Supreme Court, Washington Territory.

BRIEF FOR PLAINTIFF IN ERROR.

John R. Smith was indicted at the August term, 1868, of the District Court for the 3d Judicial District of Washington Territory, held at Seattle, in and for the counties of King, Kitsap, and Snohomish, under the 4th section of the act of Congress of March 3, 1825, for the murder of one Edward James Butler on the 28th day of April, 1868, on board the British bark Marinus, then lying at the wharf in Port Blakely, a small bay putting in from Puget Sound, and within the territorial limits of Kitsap county, as defined by the laws of said territory.

At the same term (August 19th) the plaintiff in error filed his affidavit and motion for a change of venue to Pierce county, pending which application the case, by agreement, was sent to Port Townsend for trial. At the September term, 1868, at Port Townsend, plaintiff in error filed a plea to the jurisdiction, which was demurred to by the United States Attorney. The demurrer admitted "that the offence was committed in Port Blakely bay," &c. The court sustained the demurrer.

The court then ordered "that the case be removed to King county for trial," &c. The ruling of the court upon the demurrer and remanding the case was properly excepted to by plaintiff in error. The case was remanded.

At the February term, 1869, of said court at Seattle, King county, plaintiff in error, in writing, protested against being tried in King county, and moved the court to remand the case to Port Townsend for trial. Pending this motion, February 17, 1869, a new indictment was found and the old one nolle prossed. February 19th plaintiff in error filed a motion in the nature of a plea to the jurisdiction of the court, setting up the previous change of venue, that the place where the offence was committed was within the limits of Kitsap county, and that he should be tried under the laws of Washington Territory, and not the acts of Congress. This pleading was treated as a motion, overruled, and exceptions taken.

A plea of not guilty was then entered and the case proceeded to trial.

During the progress of the trial various exceptions were taken to the introduction and rejection of evidence. Plaintiff in error also asked instructions (seven in number) to be given to the jury, which were refused. A verdict of guilty was rendered. A motion for a new trial and in arrest of judgment was then made, argued, overruled, and exceptions taken. On the 23d of February, 1869, judgment was entered up and sentence pronounced.

A writ of error was then prosecuted to the December term, 1869, of the Supreme Court of Washington Territory. The errors assigned in said supreme court were:

1st. The court below had no jurisdiction on the United States side thereof, the act of Congress (act 1790, section 8) not applying to Port Blakely, the place of the alleged murder.

2d. Said court had no jurisdiction in the premises, the case having gone to another jurisdiction by change of venue.

3d. The court erred in excluding proper evidence from the jury, and in allowing improper evidence to go to the jury.

4th. The court erred in giving improper instructions to the jury, and in refusing to give to the jury proper instructions asked for by the plaintiff in error.

5th. The court erred in overruling the plea to the jurisdiction and the motion for a new trial and in arrest of judgment.

The judgment and sentence of the court below was affirmed.

The overruling of the errors assigned, and confirmation of the judgment of the court below, is the error assigned in this court.

The first question is, Whether a writ of error lies in a criminal case from the Supreme Court of Washington Territory to the Supreme Court of the United States.

The organic act of Washington Territory, (act of March 2d, 1853, 10 Stat. at Large, p. 175,) section 9, provides for writs of error from said supreme court to the Supreme Court of the United States *in all* cases where acts of Congress, &c., are brought in question.

The 4th section of the act of March 3d, 1825, (which it is claimed the last indictment is based upon,) is brought in question in this case by the pleadings and judgment clearly and beyond question.

In construing the 25th section of the judiciary act of 1789, this court says it is sufficient if it appears upon the record that the case involves in point of law the validity or effect of "an act of Congress," or, in other words, that an act of Congress is brought in question.

See Craig et al. vs. The State of Missouri, 4 Peters, 410, and authorities cited; also Armstrong vs. The Treasurer of Athens County, 16th Peters, 281.

The questions raised by the record in this case and presented for the consideration of the court are as follows:

1st. Was the plaintiff in error properly indicted in the

district court under the acts of Congress named, or should he have been indicted under the territorial statute?

2d. After the change of venue to Port Townsend, could the old indictment be noll prossed at Seattle and a new indictment found, or is the case still pending at Port Townsend?

3d. Did the district court err in refusing the instructions asked by plaintiff in error?

As to the first point—

Plaintiff in error insists that he should have been indicted under the territorial statute defining and punishing homicide—(see acts of Washington Territory, 1863, p. 282, secs. 12–13)—because the place where the homicide occured was within the body of Kitsap county, over which the laws of the territory extended, and that neither the 8th section of the act of 1790 or the 4th section of the act of 1825 have any operation in said place.

The place Port Blakely is described in the indictment and proof with sufficient certainty, and besides the court will take judicial notice of the boundary of Kitsap county and the location of Port Blakely.—(See 1st Greenleaf on Ev., sec. 6, and authorities cited.)

The vessel was made fast to the wharf and was loading with lumber, as shown by the testimony.

As to boundaries of Kitsap county see act 1867, p. 46, Laws of Washington Territory.

Port Blakely has been within the limits of an organized county since 1848 and before. By the provisional laws of Oregon Port Blakely was in Lewis county.—(See Provisional Laws, p. —)

These provisional laws were adopted by act of August 14th, 1848, organizing Oregon Territory. (9 U. S. 14, see. 9, Stat. at Large, p. 329.) King county was created, embracing Port Blakely, in 1852.

See Laws Oregon Territory, 1852 and '3, p. 41. The laws of Oregon were adopted by organic act of Washington Territory.—(See 10th vol. Stat. at Large, p. 177, sec.

12.) Kitsap county was organized by the name of Slaughter, since changed, out of King and Jefferson, in 1857.—(See Laws of 1857, p. 852.)

Thus we see territorial jurisdiction has been claimed and exercised over the locus in quo for over twenty years under local laws.

County lines and limits may be extended over rivers, harbors, creeks, basins, and bays, and for a marine league into the main ocean.—(See Bishop's Crim. Law, sec. 605 to 610, and authorities cited.)

The territorial extent of the jurisdiction of the territorial government of Washington Territory must be determined by the acts of Congress organizing the Territories of Oregon and Washington.

Before the passage of those acts the territorial jurisdiction of the United States covered both land and water as far north as the middle of the channel of Fuca Straits, including the bay of Port Blakely.

In conferring territorial jurisdiction upon the territorial government no distinction is made between land and water. The waters were not only not excluded by any exception, but are *included* in direct and positive terms, thus: "All that part of the territory of the United States north of the 42d degree of north latitude north of the middle of the channel of the Columbia river," &c. All is embraced, and nothing is reserved. No exceptions are made. Can it be *doubted* that waters belonging to the United States, and forming no part of the *high seas*, were included? Washington Territory is bounded north by the 49th parallel, and south by the middle of the main channel of the Columbia river.—(See 1st section of Organic Act.) The 4th section of the act of 1825 is a re-enactment of the 8th section of the act of 1790, substantially, except the restriction that the place must also be within the "admiralty and maritime jurisdiction of the United States."

The 8th section of the original act (1790) refers to of-

fences committed within the body of a county, in enumerating the offences punishable by that act, in a manner that can leave no doubt upon the mind that it was the intention of Congress to provide for the punishment of offences outside of state or county limits, outside of the territorial limits of any competent jurisdiction to punish crime. Webster took this view as to the construction of section 8, 1790, in arguing the Beavens case, (3 Wheaton, 343,) and the judgment of the court sustains that view.

But, says the prosecution, the term "particular state" has been decided to mean a state of the Union, and not a foreign state or a territory. That is true for some purposes; as for instance for the purpose of bringing suit in United States courts. Again, the 8th section of the act of 1790, which has not been repealed, and must be considered in construing the 4th section of the act of 1825, provides that "the trial of crimes committed upon the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought." Certainly Congress never would have used such language with reference to a place where there was local authority to punish crime. If Port Blakely is such a place as Congress referred to in the section in question, and the plaintiff in error had been arrested in New York, his trial would have been in United States Circuit Court of that district.

The district referred to where the trial should take place is clearly a district of the Circuit Court of the United States, and therefore the trial must take place in some state, and outside of Washington or any other territory.

It has not been decided that an organized territory is not a state within the intent and meaning of the 8th section of the act of 1790, and the 4th section of the act of 1825.

This court has said that the same words have not ne-

cessarily the same meaning attached to them when found in different parts of the same instrument. That the same words have various meanings in common language.—(See Cherokee Nation vs. The State of Georgia, 5 Peters, p. 20.)

Words are to be taken according to the "common understanding of mankind, and in their popular and received sense," says Chief Justice Marshall, in passing upon the 12th section of the act of 1790, in question.—(Wiltberger's Case, 5 Wheat., p. 94.) The word state means (applying this doctrine) a political body or a body politic—the whole body of people under one government.

Whether the word *particular* limits the word state to a state of the Union is immaterial, as it does not change the meaning of the word.

An organized territory *is* a body politic, a government, a state in embryo, with organic law—laws and territorial jurisdiction—a state within the intent and meaning of the act of Congress. But, again, the plaintiff insists that these acts of Congress have been superseded and repealed by the acts of August 14, 1848, organizing Oregon Territory, and the act of March 2, 1853, organizing Washington Territory. No rule of law is better settled than that the last expression of legislative will controls; and that, when there is a conflict, the former act or acts are repealed by necessary implication.—(See Bishop's Crim. Law, sec. 9.)

The organic act of Washington Territory, (as did the Oregon act,) sec. 6, provides that the legislative power of the territory shall extend to all rightful subjects of legislation.—(See 10th vol. Stat. at Large, p. 175.)

Crime, including murder, will be admitted to be embraced in the term, "rightful subject of legislation."

Then, if Congress has delegated to the territorial legislature the power to legislate as to crime within the territorial limits of Washington Territory, and the territorial

legislature has legislated, as they have, (see laws of Washington Territory of 1854, and subsequent laws,) the acts of the territorial legislature must control.

Prior to the organization of Oregon Territory, in 1848, a murder, committed upon land, at Port Blakely, might have been punished under the 3d sec. of the act of 1790, (see Brightly, p. 202,) and a murder committed upon the water, in the bay of Port Blakely, might have been punnished under the 8th sec. of the same act, and 4th sec. of act of 1825.—(See Brightly, p. 207.)

It is not contended that the said 3d sec. is now in force in that county or in this territory, and for the reason, (not that it has been directly repealed, for it has not,) but because it is repealed by virtue of the organic acts of Oregon and Washington Territories—so far as the place in question is concerned.

Then, if sec. 3 is not in force in this territory, how can sec. 8 of the same act be still in force here, or sec. 4 of the act of 1825?

The same may be said of every section of that and all other criminal acts that were ever applicable to a territory before its organization. It is not disputed that civil process may be executed in the bay of Port Blakely; and, if so, why not criminal? Where is the distinction as to jurisdiction?

The next inquiry is, Was the change of venue regular and legal? and, if so, what was the effect thereof upon the subsequent proceedings?

The change of venue was at the instance and for the benefit of the plaintiff in error. But a prisoner may waive his right to be tried at any one place, and a change of venue, by consent of the prisoner and the prosecutor, is legal and binding upon the parties to the record.

See Bishop's Crim. Law, sec. 554.
Farr vs. Fuller, 12 Iowa, p. 84.
Pierson vs. Finney, 37 Ill., p. 80.

It was a right, then, that the plaintiff in error had, to

be tried at Port Townsend, and the court erred in remanding the case to Seattle. If the act of the district court in remanding the case to Seattle was illegal, then, in contemplation of law, the case is still pending at Port Townsend, and the subsequent proceedings at Seattle were nugatory and void, and the case is still pending at Port Townsend. The noll pross, new indictment, and trial were all nullities.

Lastly, did the court err in refusing the instructions to the jury, asked for.

The term murder, as used in the acts of Congress referred to, means murder as defined at common law.—(See United States vs. Palmer, 3 Wheat., 610.)

Murder at common law embraced man-slaughter, and under an indictment for murder a conviction for man-slaughter could be had.—(See 1st Bishop's Crim. Law, section 807, and authorities cited.)

Killing upon a sudden quarrel, or in the heat of passion, or in self-defence reduces the killing, or may reduce it to man-slaughter.—(See 2d Bishop's Crim. Law, sections 725 to 735, and authorities cited.)

Therefore, the 1st, 2d, and 3d instructions asked by plaintiff in error should have been given.

The defendant below (plaintiff in error) was entitled to the benefit of a reasonable doubt as to any material fact, and that the court erred in refusing the 4th instruction. —(See 3 vol. Greenleaf, sec. 29, and the authorities.)

JOHN J. McGILVRA,
Atty. for Plaintiff in Error.